TAN HOO ENG v. PP

HIGH COURT MALAYA, IPOH
MOHD RADZI HARUN JC
[CRIMINAL APPLICATION NO: AA-44-22-03-2018]
21 NOVEMBER 2018

CRIMINAL LAW: *Anti-Money Laundering, Anti-Terrorism Financing Act 2001 ('AMLATFA') – Sections 4(1)(a), 50(1), 87(1) & 93 – Unauthorised sale of products to various purchasers – Sessions Court Judge gave order of discharge not amounting to acquittal ('DNAA') – Applicant re-charged for lesser charges under Penal Code and AMLATFA – Application to stay pending disposal of application – Whether charges ought to be set aside and/or quashed and struck out – Whether applicant ought to be acquitted and discharged – Whether there were material defects in case – Whether there was wrong in limine – Whether application ought to be allowed*

The applicant was the director and shareholder of Syarikat Dyera-Tim Sdn Bhd ('DT') while one Lim Keck Eng ('Lim') owned 50% shareholding in Syarikat Blue Star Sawmill Sdn Bhd ('BSS'). At the same time, the applicant and Lim each held 50% of shares in Syarikat Blue Star Moulding Sdn Bhd ('BSM'). Lim lodged a police report against the applicant for the latter's unauthorised sale of products belonging to BSM/BSS to various purchasers with sale invoices issued by and payment made to DT between the period of 2009 and 2013, amounting to RM33 million ('the first police report'). This was followed by another police report by the police, under s. 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing Act 2001 ('AMLATFA') ('the second police report'). Following the second report, a freezing order was issued for the total amount of money saved into the applicant's CIMB Bank Bhd accounts. A second freezing order was later issued and the prosecution issued a seizure order, under s. 50(1) of the AMLATFA, against the applicant's CIMB accounts ('the seizure order'). The applicant was charged at the Sessions Court for 12 offences under s. 409 of the Penal Code and 21 charges under s. 4(1)(a) of the AMLATFA read together with s. 87(1)(a) of the AMLATFA. However, at the prosecution's request, the Sessions Court Judge ('SCJ') gave an order of discharge not amounting to an acquittal ('DNAA'). On the same day, the applicant was re-charged for four charges under s. 409 of the Penal Code ('CBT cases') and 54 charges under s. 4(1)(a) of the AMLATFA read together with s. 87(1) of the AMLATFA ('AMLATFA cases').

In the present application, the applicant sought the orders that (i) the 18 criminal cases against the applicant be stayed pending the disposal of this application; (ii) all the charges under the CBT cases be set aside and/or quashed and struck out and that he be acquitted and discharged from those charges; (iii) all the charges under the AMLATFA cases be set aside and/

A or quashed and struck out and that he be acquitted and discharged from those charges; and (iv) to revoke the seizure order. In support of his application, the applicant submitted that (i) the investigation was far from being completed as the SCJ had ordered for a DNAA two days after the cross-examination of the complainant; (ii) as s. 93 of the AMLATFA clearly
B provides that a written consent of the Public Prosecutor is mandatory for a prosecution for an offence under that Act, the failure of the respondent to provide the requisite written consent of the Public Prosecutor, when the charges for the AMLATFA cases were preferred against the applicant, was fatal and in contravention with arts. 5(1), 8 and/or 13 of the Federal
C Constitution; and (iii) the decision of *Lim Hui Jin v. CIMB Bank Bhd & Ors* applied and was binding on this court ('*Lim Hui Jin*'). The respondent raised preliminary objections and submitted that (i) relying on the decision in *Uthayakumar Ponnusamy v. Dato' Sri Mohd Najib Tun Razak, Perdana Menteri Malaysia* ('*Uthayakumar*'), the applicant's application shall be disallowed *ab initio* as the application failed to indicate the specific statutory provision
D relied upon by the applicant. The applicant also placed his preliminary objection that the affidavit in reply, affirmed by DPP Aida Mastura on 25 June 2018, was in violation of the court's directions given on 18 May 2018 that parties shall file their respective written submissions by 22 June 2018.

E **Held (dismissing application):**

(1) The respondent's preliminary objection was dismissed. The court has the power and jurisdiction to arrest a wrong *in limine* and to this end, there was no necessity to search for such powers or jurisdiction in the
F Criminal Procedure Code. The case of *Uthayakumar* did not apply and was irrelevant to the current application as that case related to criminal application for reliefs or declarations, while the current notice of motion drew its life from the criminal proceedings against the applicant at the Sessions Court and the cause of action was well alive. Furthermore, this
G court could apply its inherent powers to strike out a charge against the applicant if there were legitimate evidence that there was a miscarriage of justice against the applicant. (para 13)

(2) The affidavit in reply by DPP Aida Mastura was some 24 days late. There was no request for any extension of time by the prosecution on
H the filing of the said affidavit beyond the determined date. The prosecution did not see it necessary to explain or answer the applicant's preliminary objection on this issue. The applicant's preliminary objection was sustained. The affidavits in reply by DPP Aida Mastura and the applicant were both expunged and disregarded for the purpose
I of this application. (para 17)

(3) While the applicant was correct in linking the first and second freezing orders under s. 44 of the AMLATFA with the subsequent seizure order, the applicant wrongly linked those freezing and seizure orders with the newly inserted s. 52A and the amended s. 56(1) as both provisions only came into effect on 1 September 2014 and did not apply to these charges against the applicant. Section 52A and the amended s. 56(1) of the AMLATFA could not have a retrospective effect to cover the offences alleged to have been committed by the applicant during the period 2008-2014. Furthermore, s. 56(1) of the AMLATFA is not relevant to the case as it only governs situation relating to forfeiture of property where there lies no prosecution. The applicant's reliance on s. 77 of the AMLATFA also could not stand as the provision related to action, suit, prosecution or other proceedings brought, instituted or maintained in any court or before any other authority against any competent authority or relevant enforcement agency or any director or officer of competent authority or the relevant enforcement agency, which was not the case for the applicant. (paras 18 & 20)

(4) There was no hindrance for the plea to be taken from the applicant when the charges for the AMLATFA case were read to him despite the fact that there was no written consent. The stringent requirements, as provided under s. 39B(3) and (4) of the CPC did not exist under s. 93 of the AMLATFA. The non-existence of the written consent of the Public Prosecutor *per se* was not fatal. It was curable under s. 422 of the CPC. (paras 29 & 30)

(5) The decision by the respondent to DNAA and subsequently to re-charge the applicant, *albeit* lesser offences, were entirely within the full powers and discretion of the respondent. It was not for this court to interfere into such decision. It followed that there was no violation of arts. 5(1), 8 and/or 13 of the FC. (para 35)

(6) The facts governing *Lim Hui Jin* were completely different and distinguishable with the facts governing the present case. The movable property were different and related to two completely different persons. The forfeiture and seizure dates were totally distinct. *Lim Hui Jin* was clearly distinguishable from the present case and the decision in that case was inapplicable, aside from the fact that the Court of Appeal in *Lim Hui Jin* was exercising its civil appellate jurisdiction. (paras 42 & 46)

(7) The court did not find any element of material defects, or a wrong *in limine* against the applicant that required its exercise of inherent powers to arrest such wrong or to address the defects and consequentially to make the orders as prayed by the applicant. (para 47)

Case(s) referred to:

Abdul Hamid v. PP [1956] 1 LNS 3 HC ***(refd)***
Bong Kim Son v. PP [1997] 4 CLJ Supp 477 HC ***(refd)***
Bunya Jalong v. PP [2015] 5 CLJ 893 CA ***(refd)***
Chin Wooi Keat v. Isberg Corp Sdn Bhd (in receivership) & Anor [2014] 1 LNS 48 HC ***(refd)***
Dato' Sabariah Sabtu v. Peguam Negara & Ors And Other Appeals [2016] 7 CLJ 655 CA ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 8 CLJ 934 CA ***(refd)***
Hj Mohamed Paiman v. PP [1965] 1 LNS 50 HC ***(refd)***
Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister Of Home Affairs), Malaysia [1969] 1 LNS 65 FC ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Lim Hui Jin v. CIMB Bank Bhd & Ors [2018] 8 CLJ 327 CA ***(dist)***
Maria Chin Abdullah lwn. PP [2016] 5 CLJ 428 HC ***(refd)***
Mohd Azran Rahmat & Anor v. Mazlan Aliman [2015] 4 CLJ 198 CA ***(refd)***
Mohd Taufik Peter Abdullah lwn. PP [2019] 3 CLJ 221 CA ***(refd)***
PP v. Choo Chuan Wang [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329 HC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Ini Abong & Ors [2009] 1 CLJ 526 HC ***(refd)***
PP v. Lee Chan Sang [1989] 1 CLJ 144; [1989] 1 CLJ (Rep) 139 SC ***(refd)***
PP v. Oladotun Lukmanu Umaru & Ors [1990] 2 CLJ 1026; [1990] 2 CLJ (Rep) 795 HC ***(refd)***
Uthayakumar Ponnusamy v. YAB Dato' Sri Mohd Najib Tun Razak, Perdana Menteri Malaysia & Ors [2017] 6 CLJ 297 CA ***(dist)***

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing Act 2001, ss. 4(1)(a), 44(1), (5), 50(1), 52A, 56(1), (3), 77, 87(1)(a), 93
Criminal Procedure Code, ss. 376, 422
Dangerous Drugs Act 1952, s. 39B(3), (4)
Federal Constitution, arts. 5(1), 13, 145
Penal Code, s. 409

For the applicant - Gurbachan Singh & Rabinder Singh; M/s Bachan & Kartar Amir Faliq Abdul Jalil & Siti Nor Syahidah Ismail; M/s Amir Faliq & Syahidah
For the respondents - Aida Mastura Mohamed Aman & Noor Zahizan Lazarous; DPPs

Reported by Najib Tamby

JUDGMENT

Mohd Radzi Harun JC:

Application

[1] This is an application by the applicant for this court to issue the following orders:

(i) that the proceedings before the Sessions Court for the following 18 criminal cases against the applicant to be stayed pending the disposal of this application:

(a) AA-62K-37-10-2017;

(b) AA-62K-38-10-2017;

(c) AA-62K-39-10-2017;

(d) AA-62K-40-10-2017;

(e) AA-62K-41-10-2017;

(f) AA-62K-42-10-2017;

(g) AA-62K-43-10-2017;

(h) AA-62K-44-10-2017;

(i) AA-62K-45-10-2017;

(j) AA-62K-114-12-2017;

(k) AA-62K-115-12-2017;

(l) AA-62K-116-12-2017;

(m) AA-62K-117-12-2017;

(n) AA-62K-118-12-2017;

(o) AA-62K-119-12-2017;

(p) AA-62K-120-12-2017;

(q) AA-62K-121-12-2017;

(r) AA-62K-122-12-2017;

(ii) to set aside and/or quash and struck out all charges against the applicant under s. 409 of the Penal Code for the criminal cases with registration numbers as in sub-paras. (a)-(b) above, and that the applicant is acquitted and discharged from those charges;

(iii) to set aside and/or quash and struck out all charges against the applicant under s. 4(1)(a) of the Anti-Money Laundering, Anti Terrorism Financing Act 2001 (Act 613) ("AMLATFA") read together with s. 87(1) of the AMLATFA for the criminal cases with registration numbers as in sub-paras. (c)-(r) above, and that the applicant is acquitted and discharged from those charges;

(iv) to revoke the seizure order under s. 50(1) of the AMLATFA dated 24 July 2014.

Background

[2] The applicant, and one Lim Keck Eng, owns 50% shareholding respectively in Syarikat Blue Star Moulding Sdn Bhd ("BSM"). Operational and management issues pertaining to BSM are handled by the applicant. Lim Keck Eng also owns 50% shareholding in another company, Syarikat Blue

A Star Sawmill Sdn Bhd ("BSS"). Both BSM and BSS are carrying out the business of wood processing since 2006 and share storage and factory facilities.

[3] On 7 April 2014 Lim Keck Eng lodged police report No. Sg Senam/002428/14 against the applicant for the latter's alleged unauthorised sale of
B wood products belonging to BSM/BSS to various purchasers with sale invoices issued by and payment made to Syarikat Dyera-Tim Sdn Bhd ("DT"), a company where the applicant was also a director and shareholder. The police report stated that the transactions that had been carried out by the applicant for the period 2009 to 2013 amounted to approximately RM33
C million.

[4] Following the said police report, another police report No. Sg Senam/002950/14 dated 24 April 2014 was lodged by a police officer Muhammad Noorariff Shah bin Zainudin under s. 4(1) of the AMLATFA 2001 (Act 613).
D

[5] Consequent to the police report No. SG Senam/002950/14, a freezing order dated 30 April 2014, with a 90-days validity period commencing the date of issuance, was issued under s. 44(1) of the AMLATFA 2001 for "the total amount of money saved into CIMB Bank Bhd accounts" in the name of the applicant as listed in appendix A to that freezing order.
E

[6] The applicant's CIMB accounts as listed in the said appendix A were as follows:

(i) 55 fixed deposit accounts (nos. 5002572095000(1)-(55));

F (ii) one savings account no. 7031168993;

(iii) two foreign currency accounts nos 80000555440, 800009561931; and

(iv) one current account no. 8004997963.

[7] Consequent to the police report No. SG Senam/002950/14, a second
G freezing order dated 15 May 2014, with a 90-days validity period commencing the date of issuance, was issued under s. 44(1) of the AMLATFA 2001 for one current account no. 8004997963.

[8] On 24 July 2014, the Deputy Public Prosecutor issued an order under sub-s. 50(1) of the AMLATFA 2001 ("seizure order") against the applicant's
H CIMB accounts as listed in the annexure to the said seizure order as follows:

(i) 55 fixed deposit accounts (nos. 5002572095000(1)-(55));

(ii) one current account no. 8004997963; and

(iii) one investment account No. RSP 15971.
I

[9] On 15 July 2015, the applicant was charged for 12 offences under s. 409 of the Penal Code and 21 charges under s. 4(1)(a) of the AMLATFA read together with s. 87(1)(a) AMLATFA ("2015 cases").

[10] On 6 October 2017, at the DPPs' requests, the HMS gave an order of DNAA to all the 2015 cases. On the same day, 6 October 2017, the applicant was re-charged for four charges under s. 409 of the Penal Code for the criminal cases with registration numbers as listed in sub-paras 1(a)-(b) above ("CBT cases"). The applicant was also re-charged for fifty-four charges under s. 4(1)(a) of the AMLATFA read together with s. 87(1) of the AMLATFA for the criminal cases with registration numbers as enumerated in sub-paras. 1(c)-(r) above ("AMLATFA cases").

Charges Under AMLATFA

[11] It must be clarified and emphasised at the outset that the money laundering charges preferred against the applicant under s. 4(1) of the AMLATFA were for offences alleged to have been committed by the applicant during the period 24 January 2008 to 15 January 2014. Thus, the law applicable for those offences as at that date was the AMLATFA prior to its amendment *vide* Act A1467 which came into effect on 1 September 2014 *vide* PU(B) 400 dated 29 August 2014. That amendment, among others, altered the short title of the Act from "Anti-Money Laundering, Anti-Terrorism Financing Act 2001", or in short "AMLATFA", into "Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001", or in short "AMLATFPUAA". Apart from the name-change, that amendment also substantially affected s. 56(1) of the Act and a new s. 52A was also introduced. The significance and relevance of these issues are discussed specifically in the subsequent paragraphs.

Preliminary Objection

[12] Relying on the decision in *Uthayakumar Ponnusamy v. YAB Dato' Sri Mohd Najib Tun Razak, Perdana Menteri Malaysia & Ors* [2017] 6 CLJ 297, the respondent submitted that the application shall be disallowed *ab initio* as the application failed to indicate the specific statutory provision relied upon by the applicant.

[13] The applicant argued that this court has the power and jurisdiction to arrest a wrong *in limine* and to this end, there is no necessity to search for such powers or jurisdiction in the Criminal Procedure Code as advocated by the learned DPP: *PP v. Ini Abong & Ors* [2009] 1 CLJ 526; [2008] 8 MLJ 106, *Chin Wooi Keat v. Isberg Corp Sdn Bhd (in receivership) & Anor* [2014] 1 LNS 48; [2014] 10 MLJ 1. The case of *Uthayakumar Ponnusamy (supra)* does not apply and is irrelevant to the current application as that case relates to criminal application for reliefs or declarations, whereas the current notice of motion drew its life from the criminal proceedings against the applicant in the Ipoh Sessions Court and therefore the cause of action is well alive: *Dato' Sabariah Sabtu v. Peguam Negara & Ors and Other Appeals* [2016] 7 CLJ 655. The applicant further argued that this court could apply its inherent powers

to strike out a charge against the applicant if there were legitimate evidence that there was a miscarriage of justice against the applicant: *Maria Chin Abdullah v. PP* [2016] 5 CLJ 428; [2016] 9 MLJ 601, *Dato' Seri Anwar Ibrahim v. PP* [2010] 8 CLJ 934; [2010] 6 MLJ 533.

[14] This court agrees with the applicant and dismissed the respondent's preliminary objection.

[15] The applicant also placed his preliminary objection that the affidavit balasan (2) affirmed by DPP Aida Mastura binti Mohamed Aman on 25 June 2018 was in violation of the court's directions given on 18 May 2018 that parties shall file their respective written submissions by 22 June 2018.

[16] I had perused the notes of proceeding when the matter came for mention before me on 18 May 2018. On that date, I had allowed the DPP's request for a further two weeks to file the appropriate affidavit in reply to the applicant's affidavit. That request was also not objected to by the applicant's counsel. That would mean that the respondent's affidavit in reply shall be filed by 1 June 2018. At the same time, I had directed for parties to file their respective written submissions by 18 June 2018 and further submissions in reply, if any, by 22 June 2018. The hearing date of the applicant's notice of motion was also set on 16 July 2018.

[17] The said affidavit balasan (2) affirmed by DPP Aida Mastura binti Mohamed Aman on 25 June 2018 was filed on 25 June 2018, some 24 days late. There was no request for any extension of time by the respondent on the filing of the said affidavit beyond the determined date. I also found that the respondent does not see it necessary to explain or answer the applicant's preliminary objection on this issue in their submission. It is my ruling that the applicant's preliminary objection is sustained. The said affidavit affirmed by DPP Aida Mastura binti Mohamed Aman on 25 June 2018, and the affidavit in reply by the applicant affirmed on 29 June 2018 are both expunged and are disregarded by this court for the purposes of this application.

Breaches Of ss. 44, 50, 52A, 56, 77 Of AMLATFA

[18] It is this court's finding that whilst the applicant was correct in linking the freezing orders dated 30 April 2014 and 15 May 2014 under s. 44 of AMLATFA with the subsequent seizure order dated 24 July 2014 under s. 50 of AMLATFA, the applicant had wrongly linked those freezing and seizure orders with the newly inserted s. 52A and the amended s. 56(1) as both of these provisions only came into effect on 1 September 2014 and did not apply to the charges against the applicant. Section 52A and the amended s. 56(1) cannot have retrospective effect to cover the offences alleged to have been committed by the applicant during the period 24 January 2008 to

15 January 2014, as I had indicated and explained in the earlier paragraph. Not only would the amended s. 56(1) cannot apply to the said period, but the said provision is also not relevant to the case before this court as s. 56 only governs situation relating to forfeiture of property where there lies no prosecution.

[19] The applicant relied heavily on the provision of s. 52A. The applicability of this provision is discussed separately in paras. [36]-[46] below.

[20] It is also this court's finding that the applicant's reliance on s. 77 of the AMLATFA cannot stand. That provision relates to action, suit, prosecution or other proceedings brought, instituted, or maintained in any court or before any other authority against any competent authority or relevant enforcement agency, or any director or officer of the competent authority or the relevant enforcement agency, which is not the case for the applicant.

Incomplete Investigation

[21] The fact that the learned Sessions Court Judge had ordered for a DNAA upon the request by the DPP on 6 October 2017, two days after the cross-examination of the complainant by the applicant's counsel and the subsequent prosecution against the applicant with far less charges, were raised by the applicant as grounds to illustrate the applicant's contention that the investigation was far from being completed. It is also the applicant's argument that the applicant's version was not investigated. Applying the principle laid down in *Bunya ak Jalong v. PP* [2015] 5 CLJ 893; [2015] 5 MLJ 72 and *Mohd Azran Rahmat & Anor v. Mazlan Aliman* [2015] 4 CLJ 198; [2016] 4 MLJ 337, the applicant argued that the actions by the respondent to request for the charges against the applicant to be DNAA but only to be re-charged on the same day, without the investigation being completed, were actions tantamount to *mala fide*, oppression and abuse of process of court.

[22] On this issue, it is trite that it is not the concern of this court as to when and how the evidence was obtained for the cases brought before this court. What matters most would be whether or not the evidence are admissible.

[23] This court agrees with the argument put forth by the respondent that the averments of the applicant in his affidavits and the written submissions of the applicant's counsel on this issue are mere speculation and unfounded allegations. It would be premature for this court to determine at this stage whether or not the charges brought against the applicant are replete with *mala fide* or oppression as alleged by the applicant, until and unless this court hears the evidence.

[24] This court applies the principle laid down by His Lordship Agustine Paul J (as he then was) in *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1 as follows:

> It would be wrong to commence a prosecution without any investigation at all on the material ingredients to be proved. Where such investigation has been carried out, it is not illegal for the police to carry out further investigations to suit the exigencies of a case as it unfolds itself once the trial has commenced. On the facts, it could not be said that the investigation was incomplete when the accused was charged. In any event, the court is not concerned with when and how evidence was obtained but only with its admissibility.

CBT And AMLATFA Charges Without Consent

[25] The applicant argues that as s. 93 of AMLATFA clearly provides that a written consent of the Public Prosecutor is mandatory for prosecution for an offence under that Act, the failure of the respondent to provide the requisite written consent of the Public Prosecutor when the charges for the AMLATFA cases were preferred against the applicant was fatal. Applying the decision in *Bong Kim Son v. PP* [1997] 4 CLJ Supp 477; [1998] 1 MLJ 645, the applicant submitted that a breach of such mandatory requirement renders the charges illegal and is not curable under s. 422 of the Criminal Procedure Code.

[26] It is the respondent's contention that the issue should be determined by the court hearing the charges against the applicant, namely the Sessions Court and not to be raised before this court. In any event, the respondent submitted, the fact that the written consent of the Public Prosecutor was not produced by the respondent when the applicant was charged for the AMLATFA cases on 15 July 2015 does not in itself renders the charges defective as it is not fatal and curable under s. 422 of the CPC.

[27] Section 93 of AMLATFA provides simply:

> No prosecution for an offence under this Act shall be instituted except by or with the written consent of the Public Prosecutor.

As a comparison, this provision differs with sub-ss. 39B(3) and (4) of the Dangerous Drugs Act 1952 which provide as follows:

> (3) A prosecution under this section shall not be instituted except by or with the consent of the Public Prosecutor: Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained.

(4) When a person is brought before a Court under this section before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead, and the provisions of the law for the time being in force relating to criminal procedure shall be modified accordingly.

[28] In explaining the effect of these two provisions under the Dangerous Drugs Act 1952, His Lordship Hashim Yeop Sani Ag CJ (as he then was) delivering the decision of the then Supreme Court in *PP v. Lee Chan Sang* [1989] 1 CLJ 144; [1989] 1 CLJ (Rep) 139; [1989] 1 MLJ 224 said the following:

Section 39B(3) of the Act provides that a prosecution under that section shall not be instituted except by or with the consent of the Public Prosecutor. That subsection also directs that the case shall not be further prosecuted until the consent has been obtained. In respect of the respondent the Public Prosecutor's consent was issued only on 16 July 1984.

Section 39B(4) provides that when a person is brought before a court but before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead.

Section 254 of the Criminal Procedure Code deals with the power of the Public Prosecutor to decline to prosecute further at any stage of the trial. After Merdeka this provision finds its basis in art 145(3) of the Federal Constitution which provides that it is in the Attorney General's discretion to discontinue any criminal proceeding in the civil courts. It is clear from the language of s. 254 of the Criminal Procedure Code both in cl. (1) and (2) thereof that the power of the Public Prosecutor is exercisable at any stage of any trial.

Therefore on a proper reading of s. 39B and s. 41A of the Dangerous Drugs Act 1952, it is clear that s. 254 of the Criminal Procedure Code cannot apply to the facts of this case because no trial had commenced before the magistrate on 9 March 1984.

[29] The stringent requirements as provided under s. 39B(3) and (4) do not exist under s. 93 of AMLATFA. Therefore, there was no hindrance for the plea to be taken from the applicant when the charges for the AMLATFA case were read to him, despite the fact that there was no written consent.

[30] The non-existence of the written consent of the Public Prosecutor *per se* was not fatal. It is curable under s. 422 of the CPC.

Mala Fide And Oppressive Prosecution And Violation Of arts. 5(1), 8, 13 Federal Constitution

[31] The applicant argued that the first prosecution dated 15 July 2015 was instituted without written consent and in breach of s. 93 of the AMLATFA. As the written consent is mandatory, the applicant further argued that the issue of DNAA and re-charge should not arise at all and it follows that the

first, second and third prosecution against the applicant was *mala fide* and the applicant shall be unconditionally discharged against all charges: *Abdul Hamid v. PP* [1956] 1 LNS 3; [1956] 1 MLJ 231, *PP v. Oladotun Lukmanu Umaru & Ors* [1990] 2 CLJ 1026; [1990] 2 CLJ (Rep) 795; [1991] 1 MLJ 187, *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister Of Home Affairs), Malaysia* [1969] 1 LNS 65; [1969] 2 MLJ 129, *Haji Mohamed Paiman v. PP* [1965] 1 LNS 50; [1966] 1 MLJ 58, *Dato' Sabariah Sabtu v. Peguam Negara & Ors and Other Appeals* [2016] 7 CLJ 655.

[32] The applicant argues that following the decision in the case of *PP v. Choo Chuan Wang* [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329, which was endorsed by the Federal Court in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301 that art. 5(1) of the Federal Constitution imply "in favour of an accused person the right to a fair hearing within a reasonable time". As the actions by the respondent had denied the applicant a fair hearing within a reasonable time, the applicant "would be entitled to an unconditional release and the charges levelled against him would fall to the ground".

[33] It is also the applicant's argument that the continued seizing of the applicant's properties coupled with the continued prosecution of the CBT cases and the AMLATFA cases against the applicant notwithstanding the charges were without written consent (this issue had been dealt with and ruled by this court in the earlier paragraph) contravene art. 13 of the Federal Constitution.

[34] The unfettered powers of the Public Prosecutor conferred by art. 145 of the Federal Constitution and s. 376 of the Criminal Procedure Code are trite. This court would only need to refer to the most recent decision of the Court of Appeal in *Mohd Taufik Peter Abdullah lwn. Pendakwa Raya* [2019] 3 CLJ 221; [2018] MLJU 183 when His Lordship Ahmadi Asnawi JCA in delivering the decision of the court said the following:

> [46] Sehubungan dengan isu ini, keputusan majoriti dalam kes *Fam Meng Siong & Anor v. PP (supra)* di ms 473 adalah amat relevan:
>
> [19] It is within the discretion of the public prosecutor to decide what charges should be preferred in the course of the trial. In *Long bin Samat & Ors v. Public Prosecutor* [1974] 2 MLJ 152 of pp. 156-158, Suffian LP, after citing s. 376 of the CPC said:
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> … from this it would appear that the public prosecutor had a discretion as to what charges should be preferred subject of course to the power of the court to amend charges in the course of trial. That the law intends to give a wide discretion over criminal prosecutions to the public

prosecutor appears from other provisions of the Criminal Procedure Code providing that for the prosecution of certain offence his complaint is required (s. 130) and yet for other offences his written sanction (s. 120).

[20] In respect of art. 145(3) of the Constitution, Suffian LP said:

In our view this clause from the supreme law clearly gives to attorney general very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he instituted, and the courts cannot compel him to institute any criminal proceedings he does not wish to institute or to go on with any criminal proceedings which he decided to discontinue.

[35] It is the finding of this court that the decision by the respondent to DNAA and subsequently to re-charge the applicant, *albeit* lesser offences, were entirely within the full powers and discretion of the respondent. It is not for this court to interfere into such decision. It follows that there was no violation of arts. 5(1), 8 and/or 13 of the Federal Constitution as argued by the applicant.

Section 52A AMLATFA And Applicability Of The Decision Of The Court Of Appeal In *Lim Hui Jin v. CIMB Bank Berhad & Ors*

[36] As discussed earlier, s. 52A was inserted into AMLATFA *vide* Act A1467 which came into effect on 1 September 2014 *vide* PU(B) 400 dated 29 August 2014. On that date, AMLATFA is known as AMLATFPUAA.

[37] The said s. 52A provides:

A seizure order made under this Act shall cease to have effect after the expiration of twelve months from the date of the seizure order, or where there is a prior freezing order, twelve months from the date of the freezing order, if the person against whom the order was made has not been charged with an offence under this Act.

[38] Suffice for me to state that as s. 52A came into effect on 1 September 2014, it does not apply to the charges against the applicant due to the period related to the charges as I had intimated in the earlier paragraph above.

[39] I now turned to the argument by the applicant that the decision of the Court of Appeal on 31 July 2018 in the case *Lim Hui Jin v. CIMB Bank Berhad & Ors* [2018] 8 CLJ 327 applies and binds this court for the purposes of this application.

[40] The brief facts of *Lim Hui Jin* are as follows:

(i) Pursuant to a freezing order under s. 44(1) of AMLATFA, Lim Hui Jin's CIMB account no. 25164 was frozen with effect from 24 June 2014;

(ii) Paragraph 3 of the said freezing order stated that the order was valid for 90 days, pursuant to s. 44(5);

(iii) The said freezing order would cease to have effect on 21 September 2014, if Lim Hui Jin was not charged with an offence under the AMLATFA;

(iv) On 11 September 2014, a seizure order under s. 50(1) of AMLATFA was issued against Lim Hui Jin's account;

(v) The basis of the said seizure order was that the monies in the said Lim Hui Jin's account are the subject matter of an offence under s. 4(1) of AMLATFA allegedly committed by Lim Hiu Jin's mother, Tan Hoo Eng, the applicant in the case before me.

[41] The main finding by the Court of Appeal in that case was that firstly, as the seizure order was issued on 11 September 2014, ten days after the coming into effect of the amendments to AMLATFA, the said seizure order was governed by the new s. 52A. Secondly, as there was no prosecution against Lim Hui Jin under AMLATFA, and that the seizure order has expired by virtue of s. 52A, Lim Hui Jin's seized CIMB account shall be released pursuant to s. 56(3) of the Act.

[42] It is my finding that the facts governing Lim Hui Jin, *albeit* him being the son of the applicant before me and that the said Lim Hui Jin's account was linked to the charges brought against the applicant, are completely different and distinguishable with the facts governing the case before this court. The movable property is different and relates to two completely different persons. The forfeiture and seizure dates are totally distinct. Whilst Lim Hui Jin had never been charged under AMLATFA, the applicant before this court is facing multiple criminal charges under AMLATFA and the Penal Code. The new s. 52A clearly applies in the case of Lim Hui Jin as the seizure order against his CIMB account was issued after the date of coming into effect of that new section. Whereas the situation is completely the opposite in the case of the applicant as the seizure order against the applicant's properties were issued on 24 July 2014, more than one month prior to the effective date of s. 52A. The fact that the basis of the said seizure order against Lim Hui Jin's CIMB account was that the monies in the said Lim Hui Jin's account are the subject matter of an offence under s. 4(1) of AMLATFA allegedly committed by Lim Hiu Jin's mother, Tan Hoo Eng, the applicant in the case before me, is completely irrelevant, as observed by the Court of Appeal in para. [41] of its decision:

> The fact that the appellant's account is the subject matter of a criminal proceeding against the appellant's mother under section 4(1) ... is of no consequence as the freezing and seizure orders relate to the appellant's account and not his mother's account, and both orders have ceased to have effect.

[43] It also appears to this court that learned counsel for the applicant was having a misconception that the Court of Appeal in *Lim Hui Jin (supra)* had decided that the said s. 52A had a retrospective effect. As s. 52A was decided by the Court of Appeal to apply retrospectively, learned counsel for the applicant argued that the said s. 52A shall be applicable in this present case before this court, notwithstanding the freezing orders and seizure order against the applicant's movable properties were issued on 30 April 2014, 15 May 2014 and 24 July 2014, months before the coming into effect of s. 52A. This was clearly stated in paras. 4, 5 and 8 of the learned counsel's *hujahan bertulis tambahan pemohon* (2) dated 8 August 2018, as follows:

> 4. At paragraph 14 (of the Court of Appeal's judgment), it was stated that:
>
> > [14] Learned counsel for the respondents contended that section 52A of the AMLATEPUA does not apply retrospectively and that therefore the seizure order, which was issued pursuant to the freezing order dated 24.6.2014 (issued under section 44(1) of the AMLTFA) is not subject to the 12-month limitation period prescribed by section 52A.
>
> This is the precise submission made by the DPP in our case, but at paragraph 15, the Court held:
>
> > With due respect, we find no substance to the argument ...
>
> 5. From the judgment ... it is clear that the Court of Appeal did not agree with the Respondents that Section 52A does not apply retrospectively and in other words, it applies retrospectively.
>
> 8. With the benefit of the Court of Appeal decision, we respectfully submit that Section 52A applies in our present case retrospectively.

[44] This court cannot agree with the proposition put forth by learned counsel for the applicant. The context of the decision of the Court of Appeal when it ruled that s. 52A applies retrospectively was never meant to be interpreted in the manner proposed by the learned counsel. What was meant by the Court of Appeal when it says s. 52A applies retrospectively was simply that as the seizure order against Lim Hui Jin's CIMB account was issued on 11 September 2014, well after the coming into force of s. 52A on 1 September 2014, the calculation of the 12-months limitation period shall be taken to begin from the date of the issuance of the freezing order on 24 June 2014. This was what the Court of Appeal said in its judgment:

> [14] Learned counsel for the respondents contended that section 52A of the AMLATEPUA does not apply retrospectively and that therefore the seizure order, which was issued pursuant to the freezing order dated 24.6.2014 (issued under section 44(1) of the AMLTFA) is not subject to the 12-month limitation period prescribed by section 52A.

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> [15] With due respect, we find no substance to the argument. The seizure order was effected on the appellant's account on 11.9.2014, well after the coming into force of section 52A on 1.9.2014. The limitation period therefore expired on 23.6.2015, ie, 12 months after the issuance of the freezing order on 24.6.2014, or latest by 10.9.2015, ie, 12 months after the issuance of the seizure order on 11.9.2014. Whichever date is to be taken into consideration, the seizure order had ceased to have effect by the time the present Originating Summons was filed by the appellant.

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[45] The full effect of the ruling by the Court of Appeal is that notwithstanding the said freezing order was issued before the coming into effect of s. 52A, and the fact that the seizure order under s. 50(1) of AMLATFPUAA against Lim Hui Jin's CIMB account was issued on 11 September 2014 (well after the coming into effect of s. 52A), it follows that s. 52A shall also extend its reach over the preceding actions taken prior to the issuance of that seizure order namely the freezing order under s. 44(1) of the AMLATFA issued on 24 June 2014. This was the retrospectivity that was meant and intended by the Court of Appeal. That retrospectivity was never meant to also reach out to seizure orders that were issued prior to the coming into effect of s. 52A, as in the case against the applicant. To think that was the intention of the Court of Appeal is a complete delusion and misinterpretation, to say the least.

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[46] Apart from the above issue, it is the finding of this court based on the observations above that the case of *Lim Hui Jin v CIMB (supra)* is clearly distinguishable from the case before this court and the decision in that case is thus inapplicable, aside from the fact that the Court of Appeal in *Lim Hui Jin* was exercising its civil appellate jurisdiction.

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[47] Based on this court's findings as in the paragraphs above, this court does not find any element of material defects, or a wrong *in limine* against the applicant that requires this court to exercise its inherent powers to arrest such wrong or to address the defects, and consequentially to make the orders as prayed by the applicant. This court finds no merit to allow the applicant's application and the application is dismissed.

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